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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 448

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

FARMERS' COOPERATIVE COMPRESS,
Intervenor.

FARMERS' COOPERATIVE COMPRESS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Intervenor.[1]

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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1. The caption follows the caption adopted by petitioner in its petition filed herein which reflects the alignment of the parties in the Court of Appeals for the District of Columbia Circuit. It is obviously not in compliance with Supreme Court Rule 21(6), which would call for the designation of Farmers' Cooperative Compress as petitioner and all other parties as respondents. However, in the interest of avoiding confusion, the caption displayed on the petition has been duplicated. United Packinghouse, Food and Allied Workers International Union, AFL-CIO is proceeding, of course, as a respondent, although not designated in the petition as such.

OPINIONS BELOW.

Petitioner has accurately reported the citation to the decision and order of the National Labor Relations Board and is correct in stating that the opinion of the Court of Appeals for the District of Columbia Circuit is unreported.

However, petitioner's Appendix A (petition, pp. 8-9) which purports to be the decision of the National Labor Relations Board is grossly inaccurate. That portion found under the heading "Trial Examiner's Findings and Conclusions" is nothing more than an abbreviated summary of the decision and recommended order of the trial examiner,[2] apparently authored by the staff of Commerce Clearing House, Inc.,[3] and thereafter further reduced by counsel for petitioner. It should in no manner be construed as accurately reflecting any portion of the trial examiner's decision and recommended order. The representation on page 9 of the petition to the effect that "[t]he Trial Examiner's findings and conclusions are adopted" by the National Labor Relations Board, is also inaccurate. In fact, the National Labor Relations Board, at least in partial response to the exceptions of petitioner, both corrected and disregarded certain findings of the trial examiner, declined to rely on certain of his conclusions, and additionally, declined to adopt one of his recommendations. Petitioner's Appendix A wholly fails to comply with this Court's Rule 23(1)(a) and (i) by neglecting to include the opinions of the administrative agency involved.[4]

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2. In point of fact the findings and conclusions of the trial examiner consume eighteen pages of legal size paper.

3. *Farmers' Cooperative Compress and United Packinghouse, Food and Allied Workers, AFL-CIO*, 1968-1 CCH NLRB para. 22,075.

4. The Decision and Order of the National Labor Relations Board and the Decision and Recommended Order of the Trial Examiner are accurately set forth at pages 42-44 and 17-39 of the

Moreover, petitioner's Appendix B, which purports to set forth the opinion of the Court of Appeals for the District of Columbia Circuit in its entirety, is also, by virtue of certain exclusions therefrom, grossly inaccurate. Omitted therefrom are a portion of a paragraph dealing with the court's disposition of the cause (petition, p. 12) and an entire footnote setting forth the court's reasoning for remanding the cause to the National Labor Relations Board for further evidentiary proceedings. Accordingly, we have reproduced the entire paragraph from which a portion is missing in the petition and the deleted footnote as Appendix A hereto (*infra*, pp. 9-10).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit which petitioner has set forth in its Appendix C cannot be the judgment of that court which is sought to be reviewed here as that judgment was subsequently vacated by the court on March 19, 1969. Presumably, petitioner seeks review of the final judgment of the court, entered on March 19, 1969, which is reproduced herein as Appendix B (*infra*, pp. 11-13).

The order of the Court of Appeals for the District of Columbia Circuit entered May 12, 1969, denying petitioner's petition for rehearing, which order was accompanied by a separate statement of Senior Circuit Judge Danaher as to why he voted against rehearing, is also unreported. That order and statement are faithfully reproduced in the petition as Appendix D thereto (pp. 31-32).

The jurisdictional allegation is adequately set forth in the petition.

Joint Appendix transmitted to this Court as part of the record before the Court of Appeals. Moreover, conversations with counsel for the Board indicate that it will independently reproduce those decisions as appendices to its Brief in Opposition.

QUESTION PRESENTED.

Whether the order of the Court of Appeals for the District of Columbia Circuit remanding the cause to the National Labor Relations Board for further evidentiary proceedings, which order in no way operates against the petitioner, is ripe for review by this Court? Alternatively, is it not the case that review of such an order would be premature and should properly await an affirmative finding that there has been a violation of the Act?[5]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

These are adequately set forth in the petition.

STATEMENT OF FACTS.

The statement of facts contained in the petition in large measure is adequate.

The United States Court of Appeals for the District of Columbia Circuit on February 7, 1969, found the petitioner in violation of sections 8(a)(1) and 8(a)(5) of the Act and enforced the Board's order in this regard. Those violations are not here contested by petitioner. In addition, the court concluded that a policy and practice of an employer of invidious discrimination on account of race or national origin could be a violation of Section 8(a)(1) of the Act. The court, however, declined to hold that petitioner had committed such a violation of the Act and instead remanded the case to the Board for further evidentiary proceedings in order to determine whether petitioner had such a policy in fact. Thereafter, as noted by petitioner, its petition for rehearing was denied.

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5. The Labor Management Relations Act, 29 U. S. C. A. Section 141 *et seq.*

REASON FOR DENYING THE WRIT.

I.

The Question Presented for Review by Petitioner Is Prematurely Brought to This Court.

As noted above, the specific unfair labor practices which petitioner has been found to have committed are not here questioned. What petitioner seeks to question is the holding of the court that an employer's policy and practice of invidious discrimination against its employees on account of race or national origin, when established in certain ways, constitutes a violation of Section 8(a)(1) of the Act. Discussion concerning this holding was set forth by the court for the purpose of indicating guidelines against which evidence developed on remand was to be measured. The court expressly refused to find petitioner in violation of Section 8(a)(1) of the Act on the basis of its discriminatory practices as shown in the record and thought "that in fairness to the company it should have an opportunity to have the matter more fully litigated . . ." (Appendix A *infra*, p. 9). Thus, what petitioner seeks to do here is to set aside the guidelines enunciated by a court in conjunction with a remand, which, of course, is a well-established and frequent practice of courts, *before* it has been determined that petitioner is in any way in violation of those guidelines.

Elemental considerations of judicial economy strongly support the propriety of the Court of Appeals' order. That order does not find petitioner in violation of Section 8(a)(1); rather, it simply remands the cause for the further taking of evidence. If and when petitioner is found to have violated Section 8(a)(1) of the Act by virtue of a policy of racial and national origin discrimination, then at that time appropriate review could be had.

Our failure to comment on the merits of the principal question raised by petitioner should not be construed as agreement that the Court of Appeals' "reasoning is neither convincing nor supported by legal precedent" (petition, p. 5). Actually, the decision of the Court of Appeals is an exceedingly thorough and well-reasoned one as even a casual reading of it demonstrates. It is also amply supported by precedent both of the courts and of the Board, which precedent is cited in Judge Wright's opinion, recognizing the debilitating effect of racial discrimination in the labor-management relatonship. In our view the opinion does not require independent support.[6]

In summary, we simply urge that consideration of the question at this time is clearly premature.

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6. Petitioner also urges a second question upon this Court, which question has to do with whether certain issues were properly before the Court of Appeals. Petitioner concluded his discussion on this point by asserting that they were (petition, p. 6). This is apparently an error on the part of counsel for it seems clear that he intended to assert the negative of that proposition, namely, that such questions were not properly before the court. In any event, the court below adequately responded to this contention.

CONCLUSION.

For the reasons stated we respectfully request that this Court deny a Writ of Certiorari to review the judgment of Court of Appeals for the District of Columbia Circuit entered in this case.

Respectfully submitted,

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APPENDIX A.

Full paragraph from which a portion was deleted in Petitioner's Appendix B:

We affirm the Board's order against the company. The particulars of the labor dispute, the unfair labor practices, and the basis for our enforcement of the Board's order are set out in Parts I and II of this opinion. In addition, without staying the enforcement of that order, in Part III we remand the case to the Board for a hearing on whether the company has a policy and practice of discrimination against its employees on account of their race or national origin. We hold that such a policy and practice violates Section 8(a)(1) of the Act. If the Board finds that the company engages in such a policy and practice, it will devise an appropriate remedy.

Footnote 12, deleted from Petitioner's Appendix B:

12. The posture of this case leads us to order a remand on this issue. The unfair labor practice hearing against the company included a charged violation of § 8(a)(5) for failure to bargain about racial discrimination. However, the Board's General Counsel explicitly did not proceed on a theory that the discrimination itself violated § 8(a)(1). As noted, evidence indicating racial discrimination was produced to aid in finding whether there was a § 8(a)(5) bargaining violation. Thus the matter of the company's racial policies was litigated and the Examiner found, and the Board agreed, that the company did practice racial discrimination. We think, however, that in fairness to the company it should have an opportunity to have the matter more fully litigated, with notice that the question of a § 8(a)(1) violation is specifically to be deter-

mined. Thus the case is remanded to the Board to conduct such a hearing.

We note where the matter is litigated, even though the particular violation has not been specifically charged, the Board can find such a violation. See *American Newspaper Publishers Ass'n* v. *N. L. R. B.*, 7 Cir., 193 F. 2d 782 (1951); *Independent Metal Workers Union, Local No. 1*, 147 N. L. R. B. 1573 (1964).

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.

United Packinghouse, Food and Allied Workers International Union, AFL-CIO, *Petitioner*, *vs.* National Labor Relations Board, *Respondent*, Farmers' Cooperative Compress, *Intervenor.*	No. 21,627
Farmers' Cooperative Compress, *Petitioner*, *vs.* National Labor Relations Board, *Respondent*, United Packinghouse, Food and Allied Workers International Union, AFL-CIO, *Intervenor.*	No. 21,825

(Stamp: United States Court of Appeals for the District of Columbia Circuit Filed Mar 19 1969 Nathan J. Paulson Clerk.)

JUDGMENT.

Before: Prettyman, Senior Circuit Judge, and Danaher* and Wright, Circuit Judges.

These consolidated causes were submitted to this Court upon the petitions of United Packinghouse, Food and Allied Workers International Union, AFL-CIO and Farmers' Cooperative Compress to review, and the cross-petition of the Board to enforce its order issued on January 23, 1968, against Farmers' Cooperative Compress, its officers, agents, successors and assigns.

The Court heard argument of respective counsel on November 25, 1968, and has considered the briefs and transcript of record filed in these causes. On February 7, 1969, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's order against the company, and remanding the case for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby,

ORDERED AND ADJUDGED by the Court that the said order of the National Labor Relations Board directed against Farmers' Cooperative Compress, be enforced and that Farmers' Cooperative Compress, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained;

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* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case be and it hereby is remanded to the Board for further proceedings consistent with the Court's opinion.

JOHN A. DANAHER,
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

E. BARRETT PRETTYMAN,
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

J. SKELLY WRIGHT,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.